Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

MATTHEW E. JACKSON, JR.,
Petitioner,

v.

SUPREME COURT OF PENNSYLVANIA, DISCIPLINARY BOARD OF PENNSYLVANIA, OFFICE OF DISCIPLINARY COUNSEL, ROBERT DAVIS and MARK WEITZMAN, in their individual and official capacities,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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63 pp

QUESTIONS PRESENTED

I. Whether willful acts by federal judges through prerogative motions and discovery schemes to justify arbitrary decisions made to obstruct civil rights litigation for minorities and other perceived social outcasts warrant intervention by the court?

II. Whether a racial assault, by a group of white lawyers against a Black lawyer, that compels a lawsuit that is defended through brazen falsehoods that when deemed incredulous prompts the initiation of official acts of abuse and oppression calculated to enhance the defense by impugning Jackson's professional qualifications and retrogressing to a coordinated onslaught of ridicule and derision that destroys Jackson's business but the court dismissed as justified after evading the racial issues, ignores the record of concocted charges while resolving all factual issues in favor of Weitzman and neglects to review the law, shows a systematic use of the federal courts to deny civil rights to litigants?

LIST OF PARTIES

MATTHEW E. JACKSON, JR.

SUPREME COURT OF PENNSYLVANIA

DISCIPLINARY BOARD OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL

ROBERT DAVIS

MARK WEITZMAN

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

No opinions were officially or unofficially reported in this case by any court or administrative agency.

STATEMENT OF JURISDICTION

(i) The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed herein was entered on June 28, 1994.

(ii) A Petition for Rehearing filed with the United States Court of Appeals for the Third Circuit was denied on July 29, 1994.

(iii) The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment of the United States Court of Appeals by Writ of Certiorari is Title 28 U.S.C. #1254.

STATUTE INVOLVED

The statutory provision involved in this case is Title 42 U.S.C. #1983, which provides, as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

A. Procedural History

On January 23, 1992, Jackson filed this civil action against the Supreme Court of Pennsylvania, Disciplinary Board of Pennsylvania, Office of Disciplinary Counsel, Robert Davis and Mark Weitzman, in the United States District Court for the Eastern District of Pennsylvania, at No. 92-0452. Jackson sought monetary damages and declaratory and injunctive relief, pursuant to 42 U.S.C. #1981, 42 U.S.C. #1983, 42 U.S.C. #1985, 42 U.S.C. #1988 and 42 U.S.C. 2000a-1, et seq. The court had jurisdiction by reason of 28 U.S.C. 1331, 1332, and 1343.

On March 16, 1992, defendants filed a motion to dismiss. On April 6, 1992, Jackson filed an amended complaint. On the same day, the court transferred the case to the United States District Court for the Western District of Pennsylvania at No. 92-1223. The case was assigned to Judge Timothy Lewis.

On April 14, 1992, defendants renewed their motion to dismiss. On July 2, 1992, Magistrate Judge Benson recommended that counts I, III and IV be dismissed and the request for attorney's fees be stricken. He recommended that all defendants, except Weitzman and Davis, be dismissed. On August 10, 1992, the district court adopted the recommendations, as the opinion of the Court. See Appendix A and B.

Neither Weitzman nor Davis answered the complaint or communicated their reason for not answering the complaint. On January 23, 1993, they filed a motion for summary judgment.

On July 23, 1993, the magistrate-judge recommended that summary judgment be entered against Jackson. Jackson filed timely objections to the proposed findings and recommendations. See Appendix C.

On August 30, 1993, the magistrate-judge issued an order in which he removed a paragraph from his original report. See Appendix D.

On October 21, 1993,, Judge Donald Zeigler ordered that the magistrate-judge's report and recommendation become a final order of court. See Appendix E.

B. Background

This lawsuit alleges that employees of the state court maliciously prosecuted Jackson, under the color and pretense of law. Weitzman's behavior was directly incidental to his status as an attorney managing and administering investigations. His primary task was to find out whether any violations of the disciplinary rules, attributable to Jackson, had been committed. If any violation had been committed, he was to learn the precise nature of the violation and make a recommendation to the board.

Jackson is an African-American attorney. Jackson was admitted to the practice of law in 1974. Jackson worked, as a lawyer for the University of Pittsburgh, from 1975 to 1984.[1] University of Pittsburgh attorneys were permitted to have a private practice. Jackson worked on a case in which the defendant was represented by Pittsburgh's largest law firm, Reed Smith Shaw & McClay. The case settled in

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[1] Jackson v. University of Pittsburgh, 826 F2d 230, cert. den. 484 U.S. 1020 (1988)

1982. The court sealed the settlement agreement.

In 1983, the University of Pittsburgh hired David Sullivan, a white male attorney, to supervise Jackson's department. Reed Smith Shaw & McClay approached Sullivan and disclosed the settlement to him. Sullivan did not tell Jackson that he knew of the settlement. He told Jackson that he changed the departmental policy. Under his administration, attorneys were no longer allowed to work on a private practice. But while Sullivan prohibited Jackson from having a private practice, Sullivan and Jackson's white co-worker, Ronald Talarico, operated private practices out of the office.

In 1984, Sullivan fired Jackson. After he fired Jackson, Sullivan circulated documents that disparaged Jackson and took $3,000.00 from Jackson's bank account. He wrote a letter to Jackson, saying that he would return it if Jackson did not sue the University of Pittsburgh.

Jackson reported Sullivan's theft to the Disciplinary Board of Pennsylvania. The complaint was assigned to Stephen Napoli, Esquire, of the Pittsburgh Office of Disciplinary Counsel. An attorney named Martha Hartle Munsch from the Pittsburgh law firm of Reed Smith Shaw and McClay represented Sullivan.

Napoli's investigation of Jackson's complaint concluded quickly. Napoli held no hearing on Jackson's complaint. Instead, he forwarded Jackson a letter written by Munsch and signed by Napoli for the Office of Disciplinary Counsel. Napoli wrote that what Sullivan did was improper. However, Sullivan did not violate any Disciplinary Rule because he was not acting in his capacity as an attorney when he stole the money from Jackson's personal bank account.

On February 1, 1985, Jackson sued, in the United States District Court for the Western District of Pennsylvania, the University of Pittsburgh, Wesley Posvar and David Sullivan. The lawsuit alleged employment discrimination and pendent state law claims for fraud, invasion of privacy and defamation. The district court assigned the case to Senior United States District Court Judge Edward Dumbauld.

For more than a year, Judge Dumbauld never communicated with the parties or acted upon anything presented to the court. When Jackson discharged his attorney, Judge Dumbauld entered summary judgment against Jackson.

In 1987, the Third Circuit Court of Appeals reversed the summary judgment on the federal law claims. It found sufficient evidence that the university's *"twelve performance deficiencies"* were *"post hoc concoctions."*[2]

C. Mark G. Weitzman[3]

In 1987, Jackson was appointed to the position of city magistrate. The Disciplinary Board pressured the Mayor's Office to withdraw the appointment. It had a complaint from an attorney, Frank Little, who complained because a judge opened a default judgment that Little improperly took against his former law partner, Jackson's client.

When Jackson withdrew from consideration for the magistrate's post, because of the prolonged disciplinary investigation, an attorney named Mark G. Weitzman, notified Jackson that Little's disciplinary complaint had been dismissed.

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[2] Jackson v. University of Pittsburgh, supra at 234.

[3] Record on Appeal pages 373-398

In 1988, Mark Weitzman notified Jackson of a complaint from William Hurt. Hurt was a client for whom Jackson undertook two lawsuits. Hurt did not pay Jackson's bill for over a year. Jackson told Hurt to hire another lawyer.

Shortly after the Hurt complaint, Weitzman notified Jackson of a complaint from Theodora Walker for Jackson's client, Kenneth Owens-El. Owens-El hired Jackson to work on his early release from prison. Owens-El subsequently employed Jackson for two federal court lawsuits. Through a court appointment, Jackson filed a petition for him to the Pennsylvania Supreme Court. When he sued Jackson for representation in a case that occurred years before Jackson ever met him, Jackson withdrew from representing him.

In 1989, Weitzman completed his investigations of both Hurt's and Owens-El's complaints. In both cases, Robert Davis, the acting Disciplinary Counsel, notified Jackson of violations of the disciplinary rules. In both cases, he offered Jackson informal admonishments, as voluntary discipline. He advised Jackson that a failure to request hearings within ten days would be an acceptance of the proffered discipline. Jackson declined the informal admonishments, because of his innocence.

Jackson was served with the Hurt Petition for Discipline, attested to by Weitzman. Weitzman charged that Jackson refused to carry out a contract, refused to deliver files and failed to carry out Hurt's lawful purpose. After that, Jackson was served with the Owens-El Petition for Discipline. This petition did not state what Jackson allegedly did wrong in representing Owens-El.

The Hurt and Owens-El disciplinary hearings were held on the same day. In the Hurt case, Weitzman contended that

Hurt paid Jackson $1,600.00 for work that Jackson did not perform. Weitzman's witness, Hurt, testified that he did not dispute Jackson's services or Jackson's bill. Weitzman asserted that Jackson did not complete the work because Jackson was not competent to handle the case. Weitzman's witness, the attorney who succeeded Jackson, Neal Cramer, said that there was no reason to question Jackson's competence. Weitzman asserted that Jackson refused to deliver Hurt's files. Cramer said that Jackson did not refuse to deliver Hurt's files. Weitzman offered no evidence on the issue of failing to carry out Hurt's lawful purpose. (Record on Appeal at 398, 468, 466, 465)

Weitzman knew that he was mistaken about the allegations in his Owens-El Petition for Discipline. He pursued the charges anyway.[4] Weitzman's only witness was Mark Pastore, his investigator. Pastore testified that he inspected the federal court docket sheets. There was no other evidence or witness presented by Weitzman.

Shortly after the Hurt/Owens-El hearings, an attorney named Sanford Gross called Jackson's office. Jackson had represented the Rawlings for 14 months. The Rawlings were sued by a former tenant, Virginia Hanlon. They came to Jackson the day before a default judgment was to be entered because of their failure to answer the complaint. Jackson

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[4] After the petitions were served, Weitzman met with Jackson on several occasions, ostensibly to prepare for the hearings. During one of those meetings, Jackson inquired about the basis for the Owens-El charges. Weitzman said that Jackson did not file a brief in one of the federal lawsuits. Jackson explained that briefs, filed in federal court, are not recorded on the court's docket sheets. The next time Weitzman met with Jackson, Jackson asked Weitzman if he had conducted any further investigated of the Owens-El brief. Weitzman told Jackson that his investigator had contacted the federal judge and the judge confirmed that Jackson had filed the brief.

filed preliminary objections to the complaint, asserting that the complaint did not set forth a cause of action. Hanlon was required to amend the complaint. Jackson had just filed an answer to that amended complaint.

Gross said that he was retained by William and Charlotte Rawlings to take over their representation. Gross instructed Jackson to deliver the Rawlings file to him. Soon, Weitzman telephoned Jackson, telling Jackson to deliver the Rawlings file to Gross. The Rawlings owed Jackson $2,000.00 in fees. Both Weitzman and Gross were aware that the Rawlings owed Jackson outstanding fees. They did not pay or make arrangements to pay for Jackson's work.

Jackson was in the local County Courthouse when Gross approached and said *"I'm not coming to your office to get the Rawlings' file. You are going to deliver it to me. You're already in enough trouble with the Disciplinary Board."*

In April 1990, Jackson formally withdrew from representing the Rawlings. Jackson mailed the Rawlings file to Gross. One week later, Weitzman sent an eleven page letter notifying Jackson of the Rawlings disciplinary complaint.

In May 1990, Weitzman subpoenaed Jackson for another hearing on the Hurt/Owens-El charges, discussed above. Weitzman gave Jackson about three days notice to appear for this hearing.

D. Jackson v. University of Pittsburgh

In 1991, Posvar, and several other senior administrators at the University of Pittsburgh, were caught stealing university funds. On the same day that Posvar retired, Judge Dumbauld, who had ignored Jackson's University of Pittsburgh lawsuit for four years, ordered Jackson to produce

16 years of tax returns to go on with the lawsuit. Judge Dumbauld wrote that the university needed it to defend against Jackson's defamation and invasion of privacy claims.

When Jackson filed a petition for a writ of mandamus to the Third Circuit Court of Appeals, the district court shifted the case to Judge Lewis, an African-American judge with close ties to the University of Pittsburgh.5 Jackson presented a motion to recuse Judge Lewis, questioning his impartiality. Judge Lewis denied the motion. After pushing Jackson around to create a record of impudence, Judge Lewis dismissed the lawsuit. The Third Circuit Court of Appeals dismissed the appeal for Jackson's blatant didsregard of the appellate rules?

E. Mark G. Weitzman

During 1991, Weitzman notified Jackson of complaints filed by Charles Gavin and Robert Lear. Jackson had represented Gavin in six matters. After the work was completed, Gavin failed to pay for those services. Jackson maintained a retaining lien on Gavin's file. Jackson was recommended to Lear by Gavin. Jackson represented Lear in an unsuccessful religious discrimination lawsuit.

In March 1991, Weitzman sent a letter to Jackson advising that he completed his Rawlings' investigation. In April 1991, the Hurt/Owens-El hearing committee sent its recommendation to dismiss all charges, except the charge of refusing to continue to represent Hurt. Jackson filed exceptions, paying $500.00 for the hearing transcript.

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[5] Judge Lewis mentor, Wendell Freeland, was an associate of Posvar. Freeland sponsored Judge Lewis appointment to the federal bench. Freeland met with Jackson when this episode began. Freeland was a member of the University of Pittsburgh's Board of Trustees.

Davis subsequently advised Jackson of violations of disciplinary rules while representing the Rawlings. Davis offered Jackson an informal admonishment. Jackson rejected the offer.

Lear and Gavin sued Jackson in the state court. Their garbled pro se pleading was called a "class action." It alleged professional misconduct, gross and malicious disregard for the Rules of Professional Conduct and *"I filed charges against Jackson through the Disciplinary Board . . . (Mr. Wiseman) . . . they are going to recommend disciplinary action."* The court quashed the class action.[6]

In July 1991, the Disciplinary Board dismissed the charges in the Hurt and Owens-El disciplinary proceedings, discussed above. It could not understand how a fee dispute with a client became the subject of a disciplinary charge.[7]

In August 1991, Weitzman notified Jackson that he completed his investigation of Lear's complaint. Weitzman served Jackson with a Petition for Discipline alleging a *"failure to immediately deliver the Rawlings file."*

Davis subsequently notified Jackson of violations of disciplinary rules, in representing Lear. He offered Jackson

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[6] GD 91-08066 in the Court of Common Pleas of Allegheny County, Pennsylvania.

[7] The Disciplinary Board wrote: "To make the leap, as advocated by the Office of Disciplinary Counsel, from a bona fide fee dispute to neglect of an entrusted legal matter and failure to fulfill professional service contract, is a distance too far for this Board to travel. It is within an individual attorney's prerogative to enter into professional service contracts with terms he deems in the best interests of his client and his practice."

an informal admonishment. Jackson requested a formal hearing.

In October 1991, a formal disciplinary hearing was held on the Rawlings' Petition for Discipline. Weitzman contended that Jackson prejudiced the Rawlings, in the Hanlon case, by not immediately releasing their file. When he failed to present evidence to support the allegations, the hearing committee dismissed the charge.

As Jackson was leaving the Rawlings' hearing, Weitzman's investigator, Mark Pastore, served the Lear Petition for Discipline. Jackson was charged with failing to call additional (unidentified) witnesses; failing to attempt to show that Robert Lear was a Jehovah's Witness; failing to return 14 to 16 telephone calls over a thirteen months period; failing to appeal; requesting a retainer fee of $2,500 and accepting $1,000; agreeing to represent Robert Lear on a contingent fee basis which Jackson did not reduce to writing; and failing to communicate the basis of Jackson's fee in writing.

In November 1991, Weitzman subpoenaed Jackson for an investigatory hearing for Gavin's complaint. He wanted records, from 1989, for an escrow account for $150.00 that Gavin gave Jackson for costs. Since the Disciplinary Rules did not require an escrow account, Jackson attempted to cooperate by providing documents showing that Gavin was simply trying to avoid the retaining lien.

In February 1992, Gavin and Lear filed another pro se civil complaint. Lear's complaint mirrored Weitzman's Petition for Discipline. Gavin alleged fraud, malpractice and emotional distress. Gavin filed two more lawsuits against Jackson. His subsequent lawsuits alleged that Jackson suffered from *"ignorance," "incompetence" and "malicious*

disregard of Professional Rules" and attempting "to extort . . . money in retaliation for the endeavor to redress grievances via disciplinary review complaints or otherwise."[8]

In April 1992, the Lear disciplinary charges were presented to a hearing committee. Weitzman failed to present any evidence, supporting his contention that there were additional witnesses to Lear's alleged religious discrimination.[9] He had no evidence to support his allegation that Jackson failed to return telephone calls made by Lear. He presented no evidence to support his alleged merit for an appeal of the dismissal of Lear's lawsuit. Lear had no knowledge of the oral contingent fee arrangement that Weitzman alleged existed between Jackson and Lear. Lear said that Weitzman broached it to him. Dennis A. Kistler, Esquire, the husband of Weitzman's colleague, Helen Kistler, Esquire, was Weitzman's expert witness.[10]

SUMMARY OF ARGUMENT

Retribution started with Jackson's employment at the University of Pittsburgh. Reed Smith Shaw & McClay retaliated against Jackson for no legitimate reason. In carrying out the vendetta, Jackson's former supervisor,

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[8] In 1992, the Disciplinary Board dismissed Gavin's complaint. In August 1992, the state court dismissed his lawsuit, with prejudice. Gavin appealed to the Superior Court of Pennsylvania. It affirmed the dismissal.

[9] The trial judge wrote: "When asked repeatedly by his counsel to explain why he believes that he has been the victim of religious discrimination, Lear responded on one occasion. "If it is not religion, I would like to know what they had against me to be treated so bad. Such rank speculation is not the stuff of which discrimination suits are made."

[10] At the time of the judgment in this case, no disposition had been made of the Lear charges. In April 1994, the Disciplinary Board dismissed the Lear Petition for Discipline. Case No. C4- 90-785.

Sullivan went too far. His animosity followed Jackson after Jackson left the university. Reed Smith Shaw & McClay obstructed that disciplinary investigation. In Jackson's federal lawsuit against the University of Pittsburgh, former coworkers, prompted by Reed Smith Shaw McClay, berated Jackson through fabricated testimony. Through Reed Smith Shaw & McClay, the United States District Court for the Western District of Pennsylvania thwarted that lawsuit. Weitzman, acting for Reed Smith Shaw & McClay, obstructed a job opportunity, harassed, used oppressive tactics, concocted charges and suborned perjured testimony.

Racism prompted this behavior. Jackson became unacceptable when he reached a level of competence and maturity that was threatening. Defendants have discovered that they can simply fabricate testimony to avoid legal responsibility. These individuals were comfortable about lying because they are part of a systematized machine that keeps groups of people locked into jobs far below their potential, at low income levels.

The State, in regulating professions, is subject to the "minimal demands" of the Fourteenth Amendment. Jackson's right to earn a livelihood is protected by the Fourteenth Amendment of the Constitution of the United States. Phillips v. Vandygriff, 711 F.2d. 1217 (5th Cir. 1983); Truax v. Raich, 239 U.S. 33; Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Stewart v. Hannon, 469 F.Supp. 1142 (N.D. Ill. 1979). Weitzman's abuses destroyed Jackson's business. The lower courts rendered a decision that is without basis in fact or law. The federal courts should not be allowed to continue to patronize, second-rate or devalue Jackson's, or any other litigant's, qualifications in order to protect its cronies or legislate through judicial fiat.

REASONS FOR GRANTING THE WRIT

A. Every Legal Right Perverted or Obstructed

This lawsuit is simply one demonstration of what happens to a black individual, in the City of Pittsburgh, who sues the University of Pittsburgh. The University of Pittsburgh, the largest employer in Allegheny County, Pennsylvania, has never lost a racial discrimination lawsuit in the United States District Court for the Western District of Pennsylvania.

Reed Smith Shaw & McClay contrived this harassment as a reprisal for Jackson's success in a lawsuit against their client. In doing so, Reed Smith Shaw & McClay exploited its placement on the board of the University of Pittsburgh and used its associations with the Disciplinary Board. The behavior has its genesis in resentment, engendered by racism. The techniques used against Jackson are used against anyone the socially elite dismiss as inferior. People are limited in perfunctory terms rather than in terms of their abilities.

In the district court, meritorious claims of innocent persons are not the central issues in civil rights cases. Through bureaucratic scheming, procrastination and gross abuses of authority, litigants are stripped of their federal rights.

Reed Smith Shaw & McClay started by disclosing a confidential settlement to Sullivan. Sullivan, consumed by resentment, started a "whites only" policy with respect to outside legal work performed by the attorneys in the office. As his indignation ate away at him, Sullivan fired Jackson. He then slandered Jackson, invaded his privacy and stole $3,000.00 from Jackson's bank account, to coerce Jackson not to sue the University of Pittsburgh.

When Jackson filed a complaint with the Disciplinary

Board, Munsch, of Reed Smith Shaw & McClay, corrupted the disciplinary investigation. Sullivan violated the disciplinary rules, regardless of whether Sullivan was acting in his capacity as an attorney.[11] The Office of Disciplinary Counsel's stated position was that it was not a violation of any disciplinary rule for a white attorney to commit the crime of theft if the crime is committed against a black attorney.

In the University of Pittsburgh lawsuit, Munsch suborned perjured testimony from the lawyers who worked with Jackson at the University of Pittsburgh. They expounded their racism, through fabricated, stereotyped descriptions of Jackson.

Jackson's attempt to redress legal rights through the federal courts was perverted and obstructed. Judge Dumbauld made a mockery of Jackson's rights. He stalled for six and a half years as he slowly manipulated the lawsuit out of court.[12] In 1986 when he dismissed it for the first time, Judge Dumbauld expressed his resentment of black people (and others), always complaining about racial discrimination every time they have a problem. His opinion was so riddled with racial insults that it was enough to send a litigant into shock.

The Third Circuit Court of Appeal's reversal of the dismissal was meaningless. It simply created an excuse for

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[11] " . . . Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers, especially, respect for the law should be more than a platitude." Canon 1, Code of Professional Responsibility.

[12] In June 1986, Judge Dumbauld entered summary judgment on all counts of the lawsuit. In September 1989, he dismissed Jackson's claim under 42 U.S.C. 1981, leaving the Title VII claim.

oppressive tactics and professional disparagement. The racial assault went from Jackson's employment at the University of Pittsburgh to Jackson's present and future ability to work.

Weitzman's harassment started immediately after the reversal. Weitzman embarked on a mission to fulfill Sullivan's threat to ruin Jackson's career, if Jackson pursued any action against the University of Pittsburgh. Weitzman's prolonged investigation of Little's complaint was intended to obstruct Jackson's appointment to public office. Weitzman took on the task of giving credibility to the university's unfounded disparagement of Jackson's professional qualifications.13 Weitzman distorted any information that he received. He interfered with employment, impeded representation of clients, caused a substantial loss of income, reputation and caused unnecessary expense in defending against malicious disciplinary charges.

The offers of informal admonishments, that followed Weitzman's investigations, were made in bad faith to create a negative record for Jackson. When Jackson rejected those underhanded tactics, formal disciplinary charges were concocted.

The harassment culminated on the same day that Posvar retired and Judge Dumbauld wrote an order for the exhibition of Jackson's lifetime earnings. His reasoning was an outright lie.14 He had dismissed Jackson's defamation and invasion

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[13] The university called them Jackson's "twelve performance deficiencies."

[14] In 1991, Judge Dumbauld wrote ". . . it appearing that plaintiff claims substantial damages to his professional reputation by reason of alleged defamatory statements by defendant or its agents or employees; and the court being of the opinion that particularly with respect to the issue of

of privacy claims five years before he wrote the order.15 The same allegations that Jackson alleged invaded his privacy and Judge Dumbauld dismissed, became the excuse for Judge Dumbauld to participate in this racial assault.16 Judge Dumbauld wrote that it was relevant to damages to Jackson's professional reputation by the alleged defamatory statements and the invasion of Jackson's privacy by the university. The order was to clean up the University of Pittsburgh's image for its new administration. Judge Dumbauld intended to obstruct Jackson's University of Pittsburgh lawsuit.

When Jackson filed a petition for a writ of mandamus to the Third Circuit Court of Appeals, Judge Dumbauld gave the lawsuit to Judge Lewis, an African-American. Either the date of the transfer was (another) coincidence or it was backdated.17 The case was handed over to Judge Lewis, who was intrinsically involved with the administration of the University of Pittsburgh. The purpose of the University of Pittsburgh trial became an exposition of whether Jackson ever used a privilege reserved exclusively for the white employees in the office. The specific intent of transferring the case to Judge Lewis was to circumvent the appeals court and defuse

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damages, the extent of plaintiff's outside earnings for a reasonable comparable period of time subsequent to his allegedly wrongful discharge by defendant are material issues in this case, with respect to which defendant is entitled to appropriate discovery. . . ."

[15] Jackson did not appeal the dismissal of the state law claims.

[16] Reed Smith Shaw McClay wanted to discover how much of a fee Jackson received from the settlement with the client represented by Reed Smith Shaw & McClay in 1982.

[17] Jackson was not informed of the re-assignment for a month. It was supposedly transferred on the same day that the petition was filed with the Third Circuit Court of Appeals in Philadelphia.

the racial issue, as he manipulated it out of court.

During 1991 while the federal court purged Jackson's lawsuit, Weitzman harassment escalated. Weitzman coaxed Gavin and Lear to harass Jackson with malicious lawsuits while he harassed Jackson with the Rawlings disciplinary hearing in October 1991, the Gavin investigatory hearing in November 1991 and Lear disciplinary proceedings, scheduled for the day of the University of Pittsburgh trial.

Jackson traveled to Philadelphia to file this lawsuit, in the United States District Court for the Eastern District of Pennsylvania. It was an attempt to avoid the racial politics of the Western District of Pennsylvania. The case was transferred back to the Western District of Pennsylvania. To compound matters, it was assigned to Judge Lewis. The prudent thing for Jackson would have been to simply drop the lawsuit rather than waste time being led to the inevitable dismissal of the lawsuit.

In this lawsuit, Jackson alleged specific instances of disparate treatment. The lower court called it "bald allegations." What else would one expect from a court directly involved in the racial assault that prompted the lawsuit.

The lower court did not require defendants to answer the complaint. There was no discovery schedule. Defendants filed a motion for summary judgment, using as evidence that charges were not fabricated, the alleged falsifier's own statements. Once again, a lying defendant was given solicitude by the lower courts. At first, the magistrate-judge held that defendants had probable cause simply because they received complaints. Next, he declined to decide the issue of probable cause, saying that it was not a federal issue. Once again, Jackson did not get a trial on the merits of the case.

Jackson has spent the last ten years dealing with this harassment and racial politics. It is a disgraceful and sordid anecdote to the federal and state court system. In their minds, Jackson is the victim and they are the victors. The end result is a continuation of the racism and violations of civil rights.[18] It is no wonder blacks are frustrated with the legal system.[19] The ghost of Dred Scott is haunting the halls of the federal courthouse.

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[18] Per capita personal income for black city and county residents was half that of white residents according to 1989 US Census Bureau figures. Pittsburgh and Allegheny County ranked 32, among the 50 largest US cities and counties in income equality between the races. The unemployment rate for Black city and county residents is about three times that of white residents, according to the 1990 US Census Bureau statistics. Among the 50 largest cities, Pittsburgh's unemployment rate for Blacks is 18.9 percent, the country's third highest. Among the 50 largest counties, Allegheny County's Black unemployment rate was 16.7, the fourth highest in the country. The poverty rate for Black city and county residents was about four times that of white residents, according to the 1989 US Census Bureau statistics. Among the 50 largest US cities, Pittsburgh Black poverty rate of 40.9 percent was the fourth highest. Among the 50 largest counties, Allegheny County's black poverty rate also was fourth highest. The per capita personal income rose faster for residents of Pittsburgh and Allegheny County than for the remainder of the United States, between 1987 and 1992. Blacks account for 11 percent of Allegheny County and 26 per cent of the City of Pittsburgh.

[19] Very few individuals, who believe they have experienced discrimination, sue. One of ten employees, who believe they have been a victim of discrimination, file a complaint with the Equal Employment Opportunity Commission and only one of those ten, who complain to the EEOC, actually sue. In 1989, there were twenty times as many employment discrimination suits than there were in 1970. But, there was a decline in the number of lawsuits filed by blacks and women. Most of the suits involved claims of age discrimination. Federal Courts Study Commission, Working Papers and Subcommittee Reports, July 1, 1990.

B. Federal Right

The record discusses five disciplinary prosecutions brought by Weitzman against Jackson. In each case, the charges were dismissed. After each dismissal, Weitzman brought another formal disciplinary charge until Jackson spent every moment of his time defending against groundless charges brought by Weitzman.

Weitzman's harassment constructively denied Jackson the right to earn a living. It was a public act that seriously interfered with Jackson's liberty. It disrupted Jackson's practice, "drained his financial resources, curtailed his associations, subjected him to public obloquy, and created anxiety in him, his family and his friends." See United States v. Marion, 404 U.S. 307, 320 (1971). Those malicious disciplinary proceedings give rise to a constitutional violation.

The impact was of sufficient magnitude to qualify as a deprivation of a liberty interest. See Paul v. Davis, 424 U.S. 693 (1976). The protection of fundamental liberties by the due process clause extends to the injuries Jackson has suffered, because of Weitzman's abusive exercise of power to inflict grossly undue harm. See e.g. Sergio v. Doe, 769 F.Supp. 164, 167 (1991). Gomez v. Toledo, 446 U.S. 635, 640 (1980).

C. Misapplication of Law

To present a claim for malicious prosecution[20], a party

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[20] The Restatement of Torts, Second, #680, Proceedings Before an Administrative Board, provides: "One who takes an active part in the initiation, continuation or procurement of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other, is subject to liability for any special harm caused thereby, if (a) he acts without probable cause to

must prove that the defendant (1) prosecuted him without probable cause; (2) with malice; and (3) that the action terminated in favor of the plaintiff. Wainauskis v. Howard Johnson Co., 339 Pa. Super 255, 276-277 (1985).

Probable cause is an objective test of whether there were reasonable grounds for an honest belief when the prosecution was initiated. It is reasonable grounds for suspicion supported by circumstances sufficient to warrant the belief by an ordinary man under the same circumstances. Wainauskis v. Howard Johnson Co., supra, citing Hugee v. Pennsylvania R.R., 376 Pa. 286, 101 A2d 740 (1954). See also Krouse v. Feldshur, 166 Pa. 441, 72 A2d 140 (1950) See also Restatement of Torts, Second #675.21

The Third Circuit Court of Appeals held that Weitzman had probable cause, because *"[i]n each instance the complaint was instituted by a client who felt aggrieved by Jackson's conduct. . . . Indeed, they may well have been derelict in their duties if they had not presented the matters to the board."* The district court held: *"In each instance, the client*

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believe that the charge or claim on which the proceedings are based may be well founded, and primarily for a purpose other than that of securing appropriate action by the board, and (b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought."

[21] The Restatement of Torts, Second #675, Existence of Probable Cause provides the following: One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either (a) correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or (b) believes to this effect in reliance upon the advise of counsel sought in good faith and given after full disclosure of all relevant facts with his knowledge and information.

alleged conduct on plaintiff's part which could be seen as violative of disciplinary rules. In each case then, probable cause existed for beginning the disciplinary proceedings."

The lower courts made a finding of probable cause, without ever examining the elements of the alleged disciplinary violations. A review of the law should have been made to learn whether Weitzman had reasonable grounds for the institution of the prosecutions. See Restatement (Second) of Torts#675(a).

Contrary to the holding of the Third Circuit Court of Appeals and the district court, the "institution of a complaint by a client who feels aggrieved by an attorney's conduct," does not provide probable cause for formal disciplinary proceedings against the attorney.[22] In fact, very few complaints filed by clients against attorneys are ever prosecuted.[23] Letters in the record, written by Weitzman's office to individuals who filed complaints against other attorneys, show that a client's complaint does not provide probable cause to charge an attorney with a disciplinary violation.

The pertinent question is whether Weitzman and Davis had sufficient evidence to establish the probability of the truth of

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[22] The Pennsylvania Supreme Court has said that the power to discipline is not to be exercised arbitrarily. In the Matter of Shigon, 462 Pa. 1, 329 A2d 235 (1974). Disciplinary proceedings are special proceedings, sui generis. Office of Disciplinary Counsel v. Campbell, 463 Pa. 472, 345 A2d 616, cert. den. 424 U.S. 926, 47 LEd 2d 336, 96 SCt 1139 (1976). Evidence is sufficient to establish misconduct if a preponderance of the evidence establishes the violation and the proof is clear and satisfactory. Office of Disciplinary Counsel v. Keller, 506 A2d 872, 509 Pa 573 (1986).

[23] Only 10 to 15 percent of all complaints filed against attorneys ever get past the initial stage of review.

the allegations that led to the prosecution of disciplinary charges against Jackson. See e.g. Curely v. Automobile Finance Co., 343 Pa 280, 23 A2d 48, 139 A.L.R. 1082 (1941)

The record shows that fee disputes are generally not disciplinary matters. The Hurt, Rawlings and Gavin complaints are indistinguishable from the complaints rejected by the Office of Disciplinary Counsel.24 That is why the Disciplinary Board, in dismissing the Hurt charges, expressed consternation over Weitzman's filing disciplinary charges against Jackson.25

The disciplinary rules are not vehicles for resolving or avoiding disputes over client's files or retaining liens.26 The

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[24] "The mere existence of a fee dispute does not establish a violation of any specific Disciplinary Rule . . . An attorney has the right to compensation for professional services rendered, and to be reimbursed for costs and expenses which the attorney advanced out of pocket . . . Controversies over fees are not ordinarily considered as a basis for discipline of a lawyer because they usually do not involve professional misconduct. Where the parties are not able to reach an understanding and a controversy over fees continues, such dispute, like any other disagreement over the value of services, may be resolved by a lawsuit." Sonya Jordan Bacon, Assistant Disciplinary Counsel. Record on Appeal, pages 416-417.

[25] See footnote 5, above.

[26] "Additionally, you complain that Attorney ... has not released your file. It is noted that there are outstanding legal fees allegedly due ... Under the Disciplinary Rules, it is not improper for an attorney to protect the right to collect such sums by retaining possession of documents, money, or other property of the client until the claimed fee and reimbursements have been paid ..." "Thus to secure the return of papers or property to which you believe you are entitled, you will have to make arrangements to pay this c aim, or to reso ve it otherwise, in such fashion as wi prompt the attorney to vo untari y re ease the ien. You may be ieve that your interests (in regard to pending, ongoing requirements of your legal matter) are being

attorney's options, when ending a professional relationship, are well settled.27 In the Hurt, Owens-El, Rawlings and Gavin complaints, Weitzman ignored this well-settled law and the policy of the Office of Disciplinary Counsel. None of those complaints presented any exception to the general rule.28

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unduly prejudiced by the unavailability to you of the documents or property the attorney refuses to deliver. In that case, you should consult with other counsel, to learn what rights and remedies you have under the law, and what recourse is available to you." Sonya Jordan Bacon, Assistant Disciplinary Counsel. See Record on Appeal at 416-417

[27] The question of attorney's liens is generally considered to be a question of law and not of ethics. See ABA Formal Opinion No. 209 (1940). See ABA informal Opinion No. 859 (1965). See ABA informal Opinion No. 1376 (1977). See ABA informal Opinion No. 86-1520 (1986). See ABA Commission on Ethics and Professional Responsibility Formal Opinion 209 (1940); 7 Am. Jur. 2d #318; Re Paschal, 77 US 483, 19 LEd. 992; Weed Sewing Machine Co. v. Boutelle, 56 Vt 570 (1884)(possession gives attorney right to retain property until charges are paid.); McCarty v. Goodsman, 39 ND 389, 167 NW 503 (1918)(no notice required for lien to take effect.) When the client owes fees, costs and expenses, the attorney can exercise a retaining lien, as leverage. Under Pennsylvania law, the attorney's general retaining lien permits him to retain money, property or papers in his possession, to secure payment of costs and fees, not only in a particular case, but also arising out of other professional business. See Novinger v. E.I. DuPont de Nemours & Co., Inc. 809 F2d 212, certiorari denied 107 SCt 2462, 481 U.S. 1069, 95 LEd2d 871 (1987); U.S. v. Fidelity Philadelphia Trust, 450 F2d 771, (3rd Cir. 1972); Smyth v. Fidelity & Deposit Co. of Maryland, 125 Pa Super 603, Affirmed 326 Pa 391, 192 A. 640 (1937); Greek Catholic Union of Russian Brotherhood of U.S. v. Russin, 340 Pa 295, 17 A2d 402 (1940).

[28] Upon termination of representation, a lawyer shall takes steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fees that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law. Disciplinary Rule 1.8.

D. Misapprehension of Facts

The Third Circuit wrote that *"[t]he magistrate judge also indicated that Jackson did not demonstrate that Davis and Weitzman knew the allegations to be false when presented. Thus, in the magistrate judge's view, Davis and Weitzman had probable cause to initiate the disciplinary proceedings so that their actions could not be violative of section 1983."* That is a misnomer. Jackson never alleged that any client falsified allegations. Jackson alleged that Weitzman falsified allegations. See Appendix G.

It was not the function of the trial court to resolve any genuine factual issue. All factual inferences should have been made in favor of Jackson. The summary judgment procedure is not a substitute for a live trial of genuine issues of material fact. All reasonable doubts touching the existence of a genuine issue as to a material fact should have been resolved in favor of Jackson. See e.g. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)

An examination of the record provides nothing to support the charges Weitzman brought against Jackson. The evidence presented by Weitzman, in support of the motion for summary judgment, is an affidavit in which he recites complaints he allegedly received from Jackson's clients.[29] In support of his affidavit, Weitzman submitted the same documents, which Jackson alleged to be false or deceptive, as exhibits. In other words, the court based its findings of probable cause on the same documents that Jackson alleged and demonstrated were false.

The justification for the charges in the Hurt case is left

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[29] Contrary to the suggestion in the magistrate-judge's recommendation, the record does not contain any complaints from Jackson's clients.

unexplained in the record.[30] Weitzman's affidavit sidesteps the Owens-El charges. If Weitzman believed that Jackson prejudiced the Rawlings defense of the lawsuit brought against them by Virginia Hanlon, Weitzman did not articulate those facts in his affidavit.[31] Weitzman's affidavit offers no explanation for his actions in the Gavin case.[32] Weitzman failed to present any evidence showing the reasonable basis for his belief in the Lear disciplinary charges.[33]

The lower courts disregarded the fact that the prosecutions

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[30] In his affidavit, Weitzman says that Hurt complained that he was to pay Jackson periodically. (If he was to pay Jackson periodically, why did Weitzman bring disciplinary charges when Hurt failed to pay periodically?) He made daily phone calls for one month that Jackson did not return. Jackson advised Hurt to get another attorney. Jackson did not release his files. Each statement in Weitzman's affidavit is from the initial letter of inquiry that he sent to Jackson on May 11, 1988. Record on appeal, pages 155-159.

[31] In his affidavit, Weitzman says that the Rawlings and Gross told him that the Rawlings "retained" and "asked" Jackson "to represent them in a personal injury suit." Jackson was to "file suit against a bank." Jackson was to "take care of their property not being sold" for delinquent municipal taxes. The Rawlings "dismissed" Jackson. Jackson "promised to return files," but "did not return files." Jackson "failed to return phone calls."

[32] According to Weitzman's affidavit, Gavin complained that he had no pecuniary responsibility to Jackson. In reviewing the record, Gavin never paid the fee that he and Weitzman alleged that he paid. The reasons that he did not pay are the explanations of a con man.

[33] Weitzman knew, or reasonably should have known if he did not have additional witnesses. He states that Jackson had an oral contingent fee agreement with Lear. With Jackson and Lear both denying the existence of any oral contingent fee agreement, obviously Weitzman had no basis for alleging an oral contingent fee agreement.

terminated in favor of Jackson.[34] The Third Circuit Court of Appeals held that *"[w]hile the board ultimately found no violation of the applicable rules, the version of the events presented by Jackson's clients justified Davis and Weitzman in proceeding with the matters."* A jury, based on the evidence submitted to it, would find that Weitzman withheld material evidence or distorted facts. It would find that he failed to make a full and fair disclosure of all relevant facts to his superiors. See Wainauskis v. Howard Johnson Co., supra at 278, citing Miller v. Pennsylvania R.R., 371 Pa 308, 89 A2d 809 (1952).

E. Due Process

Weitzman repeatedly brought disciplinary charges against Jackson based upon weak, insubstantial or nonexistent evidence. Weitzman obfuscated issues. The record shows that Weitzman misled his superiors to get approval for formal disciplinary charges.[35] See Restatement (Second) of Torts #662, comment i.

If Weitzman contrived disciplinary charges through the pretense of a trial, it was a means of depriving Jackson of liberty through deliberate deception of the court. Such a contrivance to procure discipline against Jackson was as inconsistent with the rudimentary demands of justice as is the

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[34] The magistrate-judge erroneously held that "Further, with respect to two of the proceedings, those involving plaintiff's former clients Robert E. Lear and Charles Gavin, plaintiff was found to have violated disciplinary rules, and received discipline. Hence, with respect to two of the matters, plaintiff cannot prove that the proceedings ended in his favor." He subsequently amended his recommendation to delete that paragraph.

[35] The record does not reveal who the reviewing members may have been. It does not show whether the reviewing member was an impartial attorney or an attorney who had a bias against Jackson or a personal interest.

obtaining of a like result by intimidation. See Mooney v. Holohan, 284 U,S. 103, 112 (1935), citing Hebert v. Louisiana, 272 U.S. 312, 316-317 (1926). Jackson's substantive due process rights were violated by official acts which may not take place no matter what procedural protections accompany them. Sergio v. Doe, supra at 166, citing Hudson v. Palmer, 468 U.S. 517, 524 n4, 1045 S.Ct. 3194, 3208 n4, 82 L.Ed. 2nd 393 (1984); 42 U.S.C.A. # 1983. Losch v. Borough of Parkesburg, 736 F2d 903, 907 (3rd Cir 1984).

The probable cause finding was invalid as a substantive matter. The disciplinary proceedings were tainted by Weitzman's disregard or suppression of facts. The state's compliance with facially valid procedures for initiating formal disciplinary proceedings was not sufficient to meet the demands of due process. The due process "requirement . . . is a requirement that cannot be deemed to be satisfied by mere notice and hearing." Mooney v. Holohan, supra.

The presence or absence of probable cause is a question exclusively for the court only where there are no material conflicts in the testimony. Wainauskis v. Howard Johnson Co., 339 Pa Super 266, 488 A.2d 1117 (1985); DeSalle v. Penn Central Transportation Co., 263 Pa Super 485, 398 A2d 680 (1979); Restatement (Second) Torts, #673. Where material facts are in controversy, the question is a mixed one of fact and law. It becomes the duty of the jury to say whether the plaintiff in the civil action has shown want of probable cause upon the part of the defendant. Hubert v. Alta Life Insurance Co., 136 Pa. Super 147, 150, 7 A2d 98, 100 (1939), quoting Heisey v. Vansant, 126 Pa Super 373, 376, 190 A 726, 728 (1937). See also Hugee v. Pennsylvania Railroad Co., supra at 376.

CONCLUSION

For the reasons set forth above, Petitioner requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

Matthew E. Jackson, Jr., Esquire
Two Gateway Center, 13W
Pittsburgh, Pennsylvania 15222
(412) 391-1700

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

MATTHEW E. JACKSON, JR.,
Petitioner,

v.

SUPREME COURT OF PENNSYLVANIA, DISCIPLINARY BOARD OF PENNSYLVANIA, OFFICE OF DISCIPLINARY COUNSEL, ROBERT DAVIS and MARK WEITZMAN,
in their individual and
official capacities,
Respondents.

APPENDIX

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

Matthew E. Jackson, Jr., Esquire, pro se
Two Gateway Center, 13W
Pittsburgh, Pennsylvania 15222
(412) 391-1700

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA

MATTHEW E. JACKSON, JR., C.A. No. 92-1223
Plaintiff,

v.

SUPREME COURT OF PENNSYLVANIA, DISCIPLINARY BOARD OF PENNSYLVANIA, OFFICE OF DISCIPLINARY COUNSEL, ROBERT DAVIS and MARK WEITZMAN, in their individual and official capacities,
Defendants.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the defendants' motion be granted in part and denied in part as set forth more fully below.

II. REPORT

This is a civil rights action filed by an attorney against another attorney employed as an investigator for the Pennsylvania Office of Disciplinary Counsel, the investigator's supervisor, the Supreme Court of Pennsylvania, the Disciplinary Board, and the Office of Disciplinary Counsel. Plaintiff alleges that he has been the target of baseless investigations and disciplinary proceedings over the course of the past seven years. He asserts that defendant Weitzman has, for reasons of personal animosity and due to the influence of unidentified unscrupulous attorneys, abused his position as a member of the Office of Disciplinary Counsel through harassment of plaintiff involving improper use of the

investigatory powers of the Office of Disciplinary Counsel, and the initiation and prosecution of baseless, or inadequately based complaints. Plaintiff alleges causes of action pursuant to 42 U.S.C. ##1981, 1983 1985 and 2000(a)-1.

Defendants filed a motion to dismiss the complaint, which was filed in the United States District Court for the Eastern District of Pennsylvania. This matter was transferred to this court on the same day that Plaintiff filed an amended complaint, raising numerous arguments, and plaintiff has responded. The motion to dismiss is ripe for disposition.1

LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) cannot be granted unless the court is satisfied "that no relief could be granted under any set of facts that could be proved consistent with the allegation." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41 (1957). The issue is not whether the plaintiff will prevail at the end, but whether he should be entitled to offer evidence to support his claim. Neitzke v. Williams, 480 U.S. 319 (1989); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The complaint must be read in the light most favorable to the plaintiff and all

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1 As a preliminary note, defendants assert that Plaintiff failed to respond to the motion to dismiss filed in the Eastern District before transfer, and that their motion to dismiss the complaint should be granted as not having been opposed. Defendants rely on Eastern District Local Rule 20(c) which requires a response to a motion to dismiss, and which provides that, absent such a response, "the motion may be treated as uncontested." I do not find that this local rule prevents Plaintiff from filing a first amended complaint in response to a motion to dismiss in an attempt to cure the asserted defects in the initial complaint. Further, the rule, if applicable, does not make granting the motion mandatory. Instead, a motion not properly responded to "may be treated as uncontested." I do not choose to treat the motion as uncontested, and will address the motion to dismiss the amended complaint.

well-pled material allegations in the complaint must be taken as true. Estelle v. Gamble, 429 U.S. 97 (1976).

ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment prohibits suits against a state absent the state's consent to be sued in a particular type of case. This bar extends also to "departments or agencies of the state having no existence apart from the state." Laskaris v. Thornburg, 661 F.2d 23, 25 (3d Cir. 1981). The Supreme Court of Pennsylvania, the Disciplinary Board, and the Office of Disciplinary Counsel, as entities, are arms of the state, and may not be sued absent consent to suit by the state. Mattas v. Supreme Court of Pennsylvania, 576 F.Supp. 1178, 1182 (W.D. Pa. 1982). Pennsylvania has not consented to suit against itself, or the entities involved in this matter. See e.g. 42 Pa.C.S. #8521(b)(statute expressly does not waive Eleventh Amendment immunity in federal court actions). Accordingly, this action must proceed against the named individuals, and may not be prosecuted against the state entities.2

PROSECUTORIAL IMMUNITY

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2 As a further note, the Supreme Court, Disciplinary Board and Office of Disciplinary Counsel are not "persons" for purposes of the Civil Rights Act, and may not be sued for damages thereunder. Will v. Michigan Department of Police, ____ U.S. ___, 109 S.Ct. 2304 (1989). Finally, with respect to the Supreme Court, plaintiff alleges that the rules it promulgated for the Disciplinary Board and the Office of Disciplinary Counsel are unconstitutional in several respects. Since the Supreme Court of Pennsylvania was acting in a legislative capacity in enacting those rules, it is entitled to absolute legislative immunity from suit. Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 731-34 (1980).

APPENDIX A

The remaining defendants, Davis and Weitzman, assert that they are entitled to absolute immunity from suit due to their role as "prosecutors" in investigating and enforcing the Code of Professional Conduct in Pennsylvania. Davis and Weitzman, as members of the Office of Disciplinary Counsel, perform the investigatory and prosecutorial conduct for attorneys practicing in Pennsylvania. Pa. Const., Section 10(c), Article V. Therefore, they are entitled to the same immunity that the Justices of the Supreme Court would be entitled to if they performed the functions which they have instead delegated to the Office of Disciplinary Counsel.

In asserting a state court judge's immunity from suit, a court must look to the nature of the function performed, and not the identity of the actor. Forrester v. White, 484 U.S. 219, 229 (1988). Thus, state court judges, performing adjudicative functions, are entitled to absolute immunity from any claim for damages against them unless their conduct was "in clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 219 (1978). Judges acting in a legislative capacity are entitled to absolute legislative immunity from suit. Supreme Court of Virginia v. Consumers Union of the United States, supra, at 731-34 (1980). Judges acting in the capacity of enforcing a state code of ethics are entitled to prosecutorial immunity from damages. Id, at 734-37. In this case, defendants Davis and Weitzman investigate and file charges of attorney misconduct before the Disciplinary Board, which then issues recommendations for discipline to the Supreme Court of Pennsylvania.

Prosecutorial immunity does not bar claims for declaratory or injunctive relief. Forrester, supra, at 228-29. Nor does prosecutorial immunity extend to the actions of a prosecutor taken in either an investigative or administrative

role. Harlow v. Fitzgerald, 457 U.S. 800, 811 n.16 (1982); Mancini v. Lester, 630 F.2d 990, 992 (3d Cir. 1980). Therefore, plaintiff's requests for declaratory and injunctive relief are not barred, nor are his claims for monetary damages where the acts complained of are not quasi-judicial in nature, such as initiating a prosecution, but are instead investigatory or administrative in nature. In these latter functions, defendants Davis and Weitzman are entitled to qualified, good faith immunity.

QUALIFIED IMMUNITY

"[Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In this case, plaintiff alleges five instances where defendants Weitzman and Davis has conducted investigations against him, which culminated in investigative hearings in 1991.3 He asserts that none of the matters warranted hearings, and

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3 Defendants assert a statute of limitations defense to several of plaintiff's claims. Plaintiff alleges in the amended complaint that he has been harassed since 1987, and some of his claims do have their origin more than two years prior to the filing of the complaint in this case. Fitzgerald v. Larson, 769 F.2d 160, 162 (3d Cir. 1985). However, plaintiff asserts that each of the individual claims, involving Hurt, Owens-El, Rawlings, Lear and Gavin matters, culminated in investigatory hearings in 1991. It is these hearings which, in my reading of the complaint, form the basis for plaintiff's claims. The other allegations of harassment and pre-limitation period activities are, I believe, made only to support plaintiff's claim of bad faith on the part of defendants. Thus, I do not believe any of plaintiff's claims to be untimely as they are premised on actions taken in 1991, and this action was commenced on January 23, 1992.

that cursory investigation would have disclosed that they were meritless. Plaintiff further asserts that defendant Weitzman pursued some of these matters after the allegations against plaintiff were proven baseless, and that Weitzman fabricated evidence in one instance in order to continue a baseless investigation. At this point, with the standard of review requiring that these allegations be accepted as true, I cannot find that defendants Weitzman and Davis are entitled to good faith immunity. Pursuing an investigation after it has been determined that no basis for the charges exists is akin to malicious prosecution. See Sergio v. Doe, 769 F.Supp. 164, 168 (E.D. Pa. 1991) (complaint alleged malicious prosecution, which allegations defeated motion to dismiss on basis of qualified immunity). Defendants could not reasonably believe that pursuing an investigation after the underlying complaint has been proven baseless was lawful, nor that presenting fabricated evidence at an investigatory hearing was lawful. At this point, with no factual materials submitted from either side, good faith immunity is not a bar to the amended complaint.

SECTION 1981

Defendants Davis and Weitzman also assert that plaintiff has not stated a cause of action under Section 1981. Plaintiff asserts that his right to pursue his legal career and to enter into and perform contracts with potential clients was interfered with through defendants' actions. Section 1981 provides that "[ail persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens." This provision has been interpreted as prohibiting a party from refusing to enter into a contract with a party based upon the party's race, as well as offering a contract

only on discriminatory terms. Patterson v. McLean Credit Union, 491 U.S. ____, 105 S.Ct. 132 (1989). It has been held that Section 1981 "covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contractual obligations through legal process." Id., at 152. Here, there is no allegation that defendants refused to enter into a contract with plaintiff. Plaintiff does assert that defendants inhibited his efforts to collect moneys due from clients through their investigations. This, at least facially, appears to be an allegation that his right to enforce his clients' contractual obligations was interfered with. In Patterson, however, the Supreme Court delineated the reach of the enforcement provision of Section 1981:

> The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.

Id., at 177-78. Here, plaintiff alleges that the investigations "encouraged" his clients not to pay him, thereby forcing him to turn to legal action to collect his fees. Plaintiff does not allege that defendants have impaired his ability to pursue legal remedies, only that he has been forced to pursue legal remedies due to defendants' actions. This does not state a claim under Section 1981, and this portion of the amended complaint should be dismissed.

SECTION 1983

Defendants assert that plaintiff's claims of due process violations did not rise to the level of constitutional deprivations. Specifically, the allegations of harassment, defamation, and loss of potential future business opportunities do not

state a cause of action. While I agree that this is so, I believe that plaintiff has stated a cause of action for malicious prosecution, since the proceedings initiated by defendants are akin to a criminal prosecution. Plaintiff is asserting that he was investigated and charged without any basis, or when it should have been apparent that there was no basis for the charges. This is sufficient to state a claim under Section 1983. See Lee v. Mihalich, supra.

Defendant Davis, however, asserts that plaintiff's allegations of his involvement in these investigations amount to no more than respondeat superior, which is not sufficient under Section 1983. Rode v. Dellarciprete, 845 F.2d 1185 (3d Cir. 1988). The amended complaint contains allegations which support plaintiff's allegation that Davis expressly approved of the investigations and charges filed by Weitzman. (Amended complaint at ## 30, 47, 5&). Therefore, personal involvement by Davis in the alleged investigations is alleged, and plaintiff does state a Section 1983 claim against him.

SECTION 1985(3)

In order to state a claim under this section, a plaintiff must allege a conspiracy to deprive him of equal protection of the laws, and must also allege "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Brackenridge, 403 U.S. 88, 102 (1971). Here, plaintiff alleges that there was a conspiracy to drive out of the legal profession, but has not alleged any racial bias for the alleged conspiracy. He alleges that in another case, defendant Weitzman did not investigate an attorney charged with misconduct as thoroughly as he investigated plaintiff. (Amended Complaint #80). He

does not allege that this other attorney is white, and the amended complaint is devoid of any facts which would support his bald allegation earlier in that he has been treated differently than similarly situated white attorneys. (Amended Complaint #12). In fact, plaintiff provides a very specific motivation for the alleged conspiracy, and it has nothing to do with race or any other suspect classification. Plaintiff alleges that all of the disciplinary investigations stem from a dispute he had with an attorney in 1985, which resulted in plaintiff filing a complaint with the Disciplinary Board. Plaintiff alleges that this other attorney, and his law firm, have since that time used their influence with the Disciplinary Board to have plaintiff investigated again and again. (Amended Complaint ## 81-83).4

SECTION 1988

Plaintiff includes in his amended complaint a claim for attorney's fees pursuant to Section 1988. Defendants assert that attorney's fees are not recoverable under this provision for pro se litigants, even if the litigant happens to be an attorney. In Kay v. Ehler, ____ U.S. ____, 111 S.Ct. 1435 (1991), the Supreme Court addressed this issue:

> A rule that authorizes award of counsel fees to pro se litigants -- even if limited to those who are members of the bar -- would create a disincentive to employ counsel whenever such a plaintiff considered himself

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4 This failure to allege a racially-based discrimination would also serve as an additional basis for dismissing plaintiff's Section 1981 claim. See e.g. Grier by Grier v. Galinak, 740 F.Supp., 740 F.Supp. 338, 342 (1990)(factual allegations in complaint support claim that plaintiff would not have been stopped and questioned if he was white).

> competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Attorney's fees are not recoverable in civil rights actions by a pro se litigant. Accordingly, the request for attorney's fees should be dismissed.

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that defendants Supreme Court of Pennsylvania, Disciplinary Board of Pennsylvania, and the Office of Disciplinary Counsel be dismissed from this action. It is further recommended that counts I, III and IV of the amended complaint be dismissed, that plaintiff's request for attorney's fees be stricken, and that the motion to dismissed be denied in all other respects.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to the report.

KENNETH J. BENSON
UNITED STATES MAGISTRATE JUDGE

Dated July 2, 1992

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA

MATTHEW E. JACKSON, JR., C.A. No. 92-1223
Plaintiff,

v.

SUPREME COURT OF PENNSYLVANIA, DISCIPLINARY BOARD OF PENNSYLVANIA, OFFICE OF DISCIPLINARY COUNSEL, ROBERT DAVIS and MARK WEITZMAN, in their individual and official capacities,
Defendants.

MEMORANDUM ORDER

On May 13, 1992, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(A and (B) and Rules 3 and 4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on July 2, 1992, recommended that the defendants' motion to dismiss be granted in part and denied in part. It was recommended that defendants Supreme Court of Pennsylvania, Disciplinary Board of Pennsylvania, and the Office of Disciplinary Counsel be dismissed from this action, that counts I, III and IV of the amended complaint be dismissed, and that the motion to dismiss be denied in all other respects. It was further recommended that plaintiff's request for attorney's fees be stricken. The parties were allowed ten (10) days from the date of service to file objections. Service was made on plaintiff by certified mail delivery on July 3, 1992,

and on counsel for defendants by first class mail on July 2, 1992. Objections were filed by plaintiff on July 12, 1992. After de novo review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered.

AND NOW, this 7th day of August, 1992;

IT IS HEREBY ORDERED that defendants' motion to dismiss is granted in part and denied in part. It is ordered that defendants Supreme Court of Pennsylvania, Disciplinary Board of Pennsylvania, and Office of Disciplinary Counsel are dismissed from this action, that counts I, III and IV of the amended complaint are dismissed, and that the motion to dismiss is denied in all other respects.

IT IS FURTHER ORDERED that plaintiff's request for attorneys is stricken.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated July 2, 1992 (Document #12) is adopted as the opinion of the court.

TIMOTHY K. LEWIS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA

MATTHEW E. JACKSON, JR., C.A. No. 92-1223
Plaintiff,

v.

SUPREME COURT OF PENNSYLVANIA, DISCIPLINARY BOARD OF PENNSYLVANIA, OFFICE OF DISCIPLINARY COUNSEL, ROBERT DAVIS and MARK WEITZMAN, in their individual and official capacities,
Defendants.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS

I. RECOMMENDATION

It is respectfully recommended that the motion for summary judgment filed by defendants Davis and Weitzman (Docket No. 15) be granted.

II. REPORT

This is a civil rights action filed by an attorney against an attorney employed as an investigator for the Pennsylvania Office of Disciplinary Counsel, the investigator's supervisor, the Supreme Court of Pennsylvania, the Disciplinary Board and the Office of Disciplinary Counsel. All defendants except Davis and Weitzman were dismissed from this lawsuit by order dated August 7, 2992. Remaining in this case are allegations that investigations were conducted of plaintiff, and charges brought with the Disciplinary Board with respect to five of plaintiff's former clients, even though Weitzman and Davis knew such charges to be baseless. I have interpreted this to be a malicious prosecution claim under #1983, since

the disciplinary proceedings are akin to criminal prosecutions. All other claims have been dismissed. Defendants Davis and Weitzman have now filed a motion for summary judgment with respect to the remaining claims. Plaintiff has responded, and the motion is ripe for disposition.

SUMMARY JUDGMENT STANDARD

Summary Judgment is appropriate if, drawing all inferences in favor of the non-moving party, " . . . the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, and for which that party will bear the burden of proof at trial. Celotex Corporation v. Catrett, 477 U.S. 317 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden has been met, the non-moving party must set forth ". . . specific facts showing that there is a genuine issue for trial . . ." or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. Matsushita Electric Industrial Corp. v. Zenith Radio Corp., 475 U.S. 574 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

MALICIOUS PROSECUTION

Had plaintiff been baselessly charged with crimes by Pennsylvania authorities, he could make out a civil rights

claim for malicious prosecution by proving the following elements:

> A civil rights action for a #1983 malicious prosecution requires that: (1) the defendant initiated a criminal proceeding; (2) which ends in plaintiff's favor; (3) which was initiated without probable cause; and (4) the defendant acts maliciously or for a purpose other than bringing the defendant to justice.

Lee v. Mihalich, 847 F.2d 66, 69-70 (3d Cir. 1988). It should be noted, however, that the disciplinary proceedings are not criminal in character. In the earlier report and recommendation issued in this case, I noted that such proceedings are "akin" to criminal proceedings, in that there is an investigation of alleged misconduct, and the possibility of sanctions if misconduct is established. Hence, I did not before, and do not now equate the disciplinary proceedings in this matter with a criminal prosecution. Rather, to the extent that the disciplinary procedure has been alleged to have been misused, the most ready guide to reviewing such a claim are the elements set forth for malicious criminal prosecution.

Of particular concern to the court at the time that the motion to dismiss was pending were plaintiff's allegations that evidence was fabricated and charges manufactured by the individual defendants. Hence, the investigations were alleged to have been conducted without probable cause.5 Now,

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5 I am not ruling that probable cause is the standard to be applied to disciplinary proceedings. That question need not be decided. Clearly, however, disciplinary proceedings may not be held to a higher standard than criminal prosecutions. Hence, if there was probable cause supporting the disciplinary actions, then any lesser standard found applicable (e.g.

however, defendants have presented the complaints from plaintiff's clients which were the basis for disciplinary proceedings. In each instance, the client alleged conduct on plaintiff's part which could be seen as violative of disciplinary rules. In each casem then, probable cause existed for beginning the disciplinary proceedings. Plaintiff has failed to present any evidence that the charges were fabricated, or that defendants knew the allegations to be false when presented. Thus, the uncontroverted evidence presented by defendants establishes that the disciplinary proceedings were initiated by defendants based upon complaints made by plaintiff's clients, which complaints provided probable cause to conduct disciplinary proceedings.

Further, with respect to two of the proceedings, those involving plaintiff's former clients Robert E. Lear and Charles Gavin, plaintiff was found to have violated disciplinary rules, and received discipline. Hence, with respect to two of the matters, plaintiff cannot prove that the proceedings ended in his favor.

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motion for summary judgment (Docket No. 15) be granted.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to the report.

KENNETH J. BENSON
UNITED STATES MAGISTRATE JUDGE

Dated July 23, 1993

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reasonable cause, reasonable suspicion) would also be met.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA

MATTHEW E. JACKSON, JR., C.A. No. 92-1223
Plaintiff,

v.

SUPREME COURT OF PENNSYLVANIA, DISCIPLINARY BOARD OF PENNSYLVANIA, OFFICE OF DISCIPLINARY COUNSEL, ROBERT DAVIS and MARK WEITZMAN, in their individual and official capacities,
Defendants.

ORDER

AND NOW, this 30th day of August, 1993:

Upon consideration of plaintiff's objections (Docket #23) to the Report and Recommendation of July 23, 1993 (Docket #22), and defendants' response to plaintiff's objections (Docket #24),

IT IS HEREBY ORDERED that the Report and Recommendation of July 23, 1993, is VACATED and an amended Report and Recommendation, from which the final paragraph prior to the "Conclusion" is excised, is filed contemporaneously with this order.

KENNETH J. BENSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA

MATTHEW E. JACKSON, JR., C.A. No. 92-1223
Plaintiff,

v.

SUPREME COURT OF PENNSYLVANIA, DISCIPLINARY BOARD OF PENNSYLVANIA, OFFICE OF DISCIPLINARY COUNSEL, ROBERT DAVIS and MARK WEITZMAN, in their individual and official capacities,
Defendants.

MEMORANDUM ORDER

On May 13, 1992, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with Magistrates Act, 28 U.S.C. #636(b)(1)(A) and(B)and Rules 3 and 4 of the Local Rules for Magistrates.

The magistrate judge's amended report and recommendation, filed on August 30, 1993, recommended that the motion for summary judgment filed by defendants Davis and Weitzman be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on plaintiff on September 20, 1993 by certified mail delivery, and on counsel for defendants by first-class mail on August 30, 1993. No objections have been filed. After review of the pleadings and documents in the case, together with the report and recommendation, the following order is entered:

AND NOW, this 21st day of October, 1993;

IT IS HEREBY ORDERED that the motion for sumary

judgment filed by defendants Davis and Weitzman (Docket #15) is GRANTED.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated August 30, 1993 (Docket #26), is adopted as the opinion of the court.

DONALD E. ZEIGLER
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA

MATTHEW E. JACKSON, JR., C.A. No. 92-1223
Plaintiff,

v.

SUPREME COURT OF PENNSYLVANIA, DISCIPLINARY BOARD OF PENNSYLVANIA, OFFICE OF DISCIPLINARY COUNSEL, ROBERT DAVIS and MARK WEITZMAN, in their individual and official capacities,
Defendants.

ORDER OF COURT

AND NOW, this 28th day of October 1993, after consideration of the motion of Matthew E. Jackson, Jr., for relief from judgment,

IT IS ORDERED that the motion be and hereby is denied after a careful review of the original and amended report and recommendation of the magistrate judge and the objections of the plaintiff.

DONALD E. ŻEIGLER
UNITED STATES DISTRICT JUDGE

APPENDIX G

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 93-3610

MATTHEW E. JACKSON, JR.

Appellant

v.

SUPREME COURT OF PENNSYLVANIA;
DISCIPLINARY BOARD OF PENNSYLVANIA;
OFFICE OF DISCIPLINARY COUNSEL
ROBERT DAVIS, MARK WEITZMAN,
in their individual and
official capacities

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 92-01223)
District Judge: Honorable Donald E. Zeigler

Submitted under Third Circuit LAR 34.1(a)
June 24, 1994

BEFORE: STAPLETON and GREENBERG, Circuit Judges, and FARNAN, District Judge*

(Filed: Jun 28, 1994)

MEMORANDUM OPINION OF THE COURT

GREENBERG, Circuit Judge.

Appellant, Matthew E. Jackson, Jr., brought this action against the Supreme Court of Pennsylvania, the Disciplinary Board of Pennsylvania, the Office of Disciplinary Counsel, Robert Davis, acting chief counsel of the Office of

Disciplinary Counsel, and Mark Weitzman, assistant disciplinary counsel of the Office of Disciplinary Counsel. The action arose by reason of the institution and prosecution of various disciplinary complaints against Jackson in his capacity as a Pennsylvania attorney at law. The action against all the defendants except for Davis and Weitzman has been dismissed in an order which Jackson does not challenge on this appeal. Consequently, we are concerned only with Jackson's complaint against Davis and Weitzman. the gravaman of Jackson's complaint against Davis and Weitzman is that they, without probable cause, maliciously prosecuted disciplinary complaints filed by some of Jackson's clients against him, thereby violating 42 U.S.C. #1983.

A magistrate judge issued a report and recommendation dated August 30, 1993, in which he recommended that Davis and Weitzman be granted summary judgment. In his report and recommendation the magistrate judge indicated that Davis and Weitzman "have presented the complaints from plaintiff's clients which were the basis for the disciplinary proceedings,"that in "each instance, the client alleged conduct on plaintiff's part which could be seen as violative of disciplinary rules," and that, in these circumstances, "probable cause existed for beginning the disciplinary proceedings." The magistrate judge also indicated that Jackson did not demonstrate that Davis and Weitzman knew the allegations to be false when presented. Thus, in the magistrate judge's view, davis and Weitzman had probable cause to initiate the disciplinary proceedings so that their actions could not be violative of section 1983. The district court adopted the report and recommendation by order dated October 21, 1993; and, following Jackson's filing of a motion for relief from that order, by order of October 28, 1993, it adher to the

order of October 31, 1993. jackson then appealed from the order of October 21, 1993.

We recognize, of course, that a plaintiff may establish a cause of action under section 1983 by proving that the defendants maliciously prosecuted him. See Rose v. Bartle, 871 F.2d 331, 348 (3rd Cir. 1989). Furthermore, we will assume that the prosecution of a disciplinary complaint, though not a criminal prosecution, can be the basis for a section 1983 complaint predicated on malicious prosecution. Accordingly, we have reviewed this matter to determine whether Davis and Weitzman had probable cause in presenting these matters to the Disciplinary Board.

Clearly, they did have probable cause and thus the fact that the board did not impose discipline is not controlling. In each instance the complaint was instituted y a client who felt aggreived by Jackson's conduct. While the board ultimately found no violation of that applicable rules, the version of the events presented by Jackson's clients justified Davis and Weitzman in proceeding with the matters,. Indeed, they may well have been derelict in their duties if they had not presented the matters to the board.

The order of October 21, 1993, will be affirmed.

TO THE CLERK:

Please file the foregoing memorandum opinion.

GREENBERG CIRCUIT JUDGE

APPENDIX H

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 93-3610
MATTHEW E. JACKSON, JR.
Appellant
v.
SUPREME COURT OF PENNSYLVANIA;
DISCIPLINARY BOARD OF PENNSYLVANIA;
OFFICE OF DISCIPLINARY COUNSEL
ROBERT DAVIS, MARK WEITZMAN,
in their individual and
official capacities
On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 92-01223)
District Judge: Honorable Donald E. Zeigler

BEFORE: STAPLETON and GREENBERG,
Circuit Judges, and FARNAN, District Judge*

The petition for panel rehearing filed by appellant, Matthew E. Jackson, in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

BY THE COURT:

CIRCUIT JUDGE

DATED: JUL 29 1994